92-428

Supreme Court, U.S.
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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1992

STANLEY V. GRAFF,
Petitioner,

VS.

BANK ONE, TEXAS, N.A. (f/k/a Deposit Insurance Bridge Bank, N.A.), as Assignee of the Federal Deposit Insurance Corporation, as Receiver for MBank Dallas, N.A., and FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for MBank Dallas, N.A.,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

QUESTION 1 -- DEPARTURE FROM ACCEPTED AND USUAL COURSE; IMPORTANT QUESTION TO BE DECIDED BY THIS COURT; DUE PROCESS

Did the Court of Appeals improperly extend the protection of D'Oench, Duhme and Section 1823(e) and thereby eliminate a bona fide fact issue related to the payment of interest on Graff's loan? .24

QUESTION 2 -- DEPARTURE FROM ACCEPTED AND USUAL COURSE; DUE PROCESS

Did the District Court recognize and then improperly obliterate the fact issue created by MBank's efforts to wrongfully pressure Graff's father and did the Court of Appeals thereafter err in denying the existence of the very same fact issue expressly recognized by the District Court? 37

QUESTION 3 --- CONFLICT WITH ANOTHER FEDERAL COURT OF APPEALS; DEPARTURE FROM ACCEPTED AND USUAL COURSE; DUE PROCESS

Did the Court of Appeals improperly rely on tainted affidavits to eliminate fact issues and thus pave the way for the case to be decided by summary judgment rather than by trial? 45

PARTIES TO THE PROCEEDING

1. Bank One, Texas, N.A. (f/k/a Deposit Insurance Bridge Bank, N.A.), as Assignee of the Federal Deposit Insurance Corporation, as Receiver for MBank Dallas, N.A.

2. Federal Deposit Insurance Corporation, as Receiver for MBank Dallas, N.A.

3. Stanley V. Graff

4. William Frank Carroll of the law firm of Donahoe, Jameson & Carroll in Dallas, Texas.

5. Ann S. DuRoss, Assistant General Counsel, Richard J. Osterman, Jr., Senior Counsel, and Jerome A. Madden, Counsel for Federal Deposit Insurance Corporation in Washington, D.C.

6. Patricia Chalbeck for Federal Deposit Insurance Corporation in Dallas, Texas.

7. Robert J. Clary of the law firm of Owens, Clary & Aiken, L.L.P. in Dallas, Texas.

8. Tom Thomas and Kristin A. Nilsson of the law firm of Kolodey & Thomas in Dallas, Texas.

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OPINIONS DELIVERED IN THE CASE

This petition seeks to appeal the May 15, 1992, decision of Circuit Judges Garwood and DeMoss and District Judge Schwartz sitting for the United States Court of Appeals for the Fifth Circuit wherein the Fifth Circuit affirmed the judgment of the United States District Court for the Northern District of Texas, Dallas Division.[1] The judgment of the district court is embodied in the final judgment and the amended final judgment signed by the Honorable Robert W. Porter

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[1] A copy of the May 15, 1992, opinion of the Fifth Circuit is included in Appendix as Exhibit "A".

on July 23, 1991, and July 26, 1991, respectively.[2]

STATEMENT OF JURISDICTION

Graff requests that this Court review the judgment of the United States Court of Appeals for the Fifth Circuit, filed on May 15, 1992. Graff's Petition for Rehearing was denied by the Fifth Circuit on June 11, 1992.[3] This Court

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[2] Copies of the September 18, 1989, Interlocutory Summary Judgment, the July 23, 1991, Final Judgment and the July 26, 1991, Amended Final Judgment are included in Appendix as Exhibits "B", "C", and "D", respectively.

[3] A copy of the June 11, 1992, denial of Graff's Petition for Rehearing is included in Appendix as Exhibit "E".

has jurisdiction under 28 U.S.C. § 1254 in that Section 1254(1) provides that "[c]ases in the courts of appeals may be reviewed by the Supreme Court ... [b]y writ of certiorari granted upon the petition of any party to any civil ... case ... after rendition of judgment or decree ...."[4]

FEDERAL STATUTES INVOLVED

In compliance with Rule 14 of the Supreme Court Rules, the text of the relevant Constitutional provisions and federal statues are as fcllows:

U.S. CONST. amend. V:

No person shall be held to answer for a capital, or otherwise infamous

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[4] 28 U.S.C.A. § 1254 (Supp. 1992).

crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War, or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. VII:

In Suit at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a

jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

12 U.S.C.A. § 1819(b)(2)(B) (Supp. 1992):

(B) REMOVAL

Except as provided in subparagraph (D), the Corporation may, without bond or security, remove any action, suit, or proceeding from a State court to the appropriate United States district court before the end of the 90-day period beginning on the date the action, suit, or proceeding is filed against the Corporation or the Corporation is substituted as a party.

12 U.S.C.A. § 1821(n)(4)(I) (1989):

Each bridge bank chartered under this subsection shall have all corporate

powers of, and be subject to the same provisions of law as, a national bank, except that - no agreement which tends to diminish or defeat the right, title or interest of a bridge bank in any asset of an insured bank in default acquired by it shall be valid against the bridge bank unless such agreement -

(i) is in writing,

(ii) was executed by such insured bank in default and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by such insured bank in default,

(iii) was approved by the board of directors of such insured bank in default or its loan committee, which approval

shall be reflected in the minutes of said board or committee, and

(iv) has been, continuously from the time of its execution, an official record of such insured bank in default.

12 U.S.C.A. § 1823(e) (1989):

No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement --

(1) is in writing,

(2) was executed by the depository institution and any person claiming an adverse interest thereunder, including

the obligor, contemporaneously with the acquisition of the asset by the depository institution,

(3) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and

(4) has been, continuously, from the time of its execution, an official record of the depository institution.

28 U.S.C.A. § 1254(1) (Supp. 1992):

COURT OF APPEALS; CERTIORARI; APPEAL; CERTIFIED QUESTIONS

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any

civil or criminal case, before or after rendition of judgment or decree.

28 U.S.C.A. § 1291 (Supp. 1992):

FINAL DECISIONS OF DISTRICT COURTS

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C.A. 1441(b) (1973):

Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

FED. R. CIV. P. 56(a)-(d) (1982 & Supp. 1992):

SUMMARY JUDGMENT

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory

judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the

day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing on the motion, by examining the

pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

STATEMENT OF THE CASE

Plaintiff MBank Dallas, N.A. ("MBank") filed suit in Texas state court on January 11, 1989, against Graff to recover the unpaid principal and accrued interest on a written promissory note, as modified, plus attorneys' fees.[5] On or about March 28, 1989, the Comptroller of the Currency declared MBank insolvent and appointed the Federal Deposit Insurance Corporation as Receiver for MBank (the "FDIC-Receiver").[6] On June 26, 1989, Deposit Insurance Bridge Bank, N.A., as assignee of the FDIC-Receiver, intervened.[7] Bank One, as Assignee of the

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[5] Record on Appeal, V. 1: 005-046.

[6] Record on Appeal, V. 1: 002.

[7] Record on Appeal, V. 1: 052-054.

FDIC-Receiver, and the FDIC-Receiver removed the action to federal court on September 19, 1989.[8] Plaintiffs premised removal of the state court case to federal court on 12 U.S.C.A. § 1819 and 28 U.S.C.A. § 1441(b) which provide for removal of a cause of action without regard for the citizenship or residence of the parties.

In various pleadings, Plaintiff[9] alleges that on or about April 22, 1985, Graff executed a secured promissory note

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[8] Record on Appeal, V. 1: 001.

[9] The term "Plaintiff" refers to the initial plaintiff, MBank Dallas, N.A., and its successors in interest depending on which entity was the party plaintiff at the time the relevant pleading was filed.

to MBank Grand Prairie in the principal sum of $4,050,000.00, plus interest.[10] Plaintiff further alleges that the parties subsequently renewed, modified, and extended the note through a series of agreements.[11]

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[10] Record on Appeal, V. 1: 006. A copy of the referenced note is attached as Exhibit "A-1" to the Affidavit of Ron Tomlin in Support of Plaintiff's Motion for Summary Judgment ("Tomlin Affidavit"). Record on Appeal, V. 1: 079.

[11] Record on Appeal, V. 1: 006-007. A copy of the final renewal and extension agreement is attached as Exhibit "A-2" to the Tomlin Affidavit. Record on Appeal, V. 1: 080-084.

Plaintiff alleges that Graff did not make the principal payment or interest payment due on July 20, 1988.[12] Thus, Plaintiff claims that Graff is in default.[13] Plaintiff states that despite Plaintiff's demand[14] for payment, Graff failed and refused and continues to fail and refuse to pay the principal and accrued interest due on the modified note.[15] Plaintiff alleges that it

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[12] Record on Appeal, V. 1: 007.

[13] Record on Appeal, V. 1: 007, 070.

[14] A copy of the demand made upon Graff is attached as Exhibit "A-3" tc the Tomlin Affidavit. Record on Appeal, V. 1: 085-086.

[15] Record on Appeal, V. 1: 007.

therefore accelerated the indebtedness.[16]

Plaintiff MBank initially claimed that it is the owner and holder of the note in question.[17] Subsequently, Bridge Bank, and thereafter Bank One, asserted that it acquired the note and extension agreement from the FDIC-Receiver through a Purchase and Assumption Agreement dated March 28, 1989, and that Bridge Bank, and thereafter Bank One, is the present legal owner, holder, and possessor of the note and extension agreement in question.[18]

Graff, on the other hand, alleges that MBank instructed him not to pay interest on the note at one point in time and further alleges that Bridge Bank or

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16 Record on Appeal, V. 1: 077.

17 Record on Appeal, V. 1: 008.

18 Record on Appeal, V. 1: 070.

its assignor, MBank, and/or FDIC-Receiver contacted relatives of Graff not liable as debtors or guarantors on the debt in question concerning the alleged indebtedness as well as the financial condition of Graff.[19] Graff asserts that such conduct amounts to a waiver of Bank One's right to collect interest, unfair debt collection practices, and violations of the Texas Deceptive Trade Practices Act for which Graff is entitled to damages and additionally, that because of such conduct, Plaintiff has waived and is estopped from recovering the debt and accrued interest which it seeks by this litigation.[20]

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[19] Record on Appeal, V. 1: 108-114, 119, 123.

[20] Record on Appeal, V. 1: 119.

Based on the foregoing allegations, Plaintiff filed its motion for summary judgment asserting that no genuine issue exists as to any material fact and that it was therefore entitled to judgment as a matter of law.[21] Judge Brooks, sitting for the 95th Judicial District Court, granted an Interlocutory Summary Judgment on September 18, 1989, notwithstanding Graff's claims of waiver and estoppel and ordered that Bank One recover principal and interest from Graff in the sum of $4,022,738.00 and $638,645.62, respectively, plus reasonable attorneys' fees in the amount of $8,250.00.[22]

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[21] Record on Appeal, V. 1: 068-074.

[22] Record on Appeal, V. 1: 126-130.

On May 1, 1990, Plaintiff filed its motion for summary judgment against Graff's counterclaim for unfair debt collection practices, deceptive trade practices, and attorneys' fees.[23] The Court rendered a Memorandum Opinion and Order Granting Summary Judgment on June 18, 1991, in favor of Plaintiffs as to all claims asserted by Graff.[24] On July 23 and 26, 1991, the Court entered a Final Judgment and an Amended Final Judgment, respectively, incorporating both its summary judgment decisions. Graff appealed to the Fifth Circuit from that final judgment.

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[23] Record on Appeal, V. 1: 146-152.

[24] Record on Appeal, V. 2: 364-372.

For significantly different reasons than articulated by the District Court, the Fifth Circuit affirmed the District Court's judgment. Graff contends that the Fifth Circuit's decision is directly contrary to the decision of the trial court in several material respects and, more importantly, is directly against the case authority set forth by various other federal circuit courts.

BASIS FOR FEDERAL JURISDICTION

The Court of Appeals had jurisdiction under 28 U.S.C.A. § 1291 in an appeal from a final judgment of the United States District Court for the Northern District of Texas, Dallas Division.

The United States District Court for the Northern District of Texas, Dallas Division, had jurisdiction following removal of this action from the State court by Bank One and the FDIC-Receiver on September 19, 1989, pursuant to 12 U.S.C.A. § 1819 and 28 U.S.C.A. § 1441(b).

ARGUMENT AND AUTHORITY
ALLOWING THE WRIT OF CERTIORARI

QUESTION 1 --- DEPARTURE FROM ACCEPTED AND USUAL COURSE;IMPORTANT QUESTION TO BE DECIDED BY THIS COURT; DUE PROCESS

Did the Court of Appeals improperly extend the protection of D'Oench, Duhme and Section 1823(e) and thereby eliminate a bona fide fact issue related to the payment of interest on Graff's loan?

The over-burdened federal judiciary has responded unfairly to pressures arising from a growing flood of litigation which resulted from the glut of poorly managed banks and savings and loans. The courts have used the doctrine of D'Oench, Duhme,[25] 12 U.S.C.A. § 1823(e), and the concept of "public

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[25] D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942).

policy" to effectively eliminate a borrower's affirmative claims and defenses against any insolvent bank as well as its successor entities. The federal judiciary has essentially adopted, knowingly or unknowingly, an unstated federal policy to lessen the number of jury trials by D'Oenching borrowers' bona fide fact issues through the use of quick and easy summary judgments. Although bankers and regulators share portions of the blame for the poorly managed banks, only the borrowers are singled out for D'Oenching. This case demonstrates that the expansion of these policies against borrowers has now gone too far. The unwarranted extension preempts Graff's ability to obtain a trial on the merits of the case and

thereby violates his Article Five and Article Seven rights to due process by depriving him of property without a trial by jury.[26] This Court must restrict application of D'Oench, Duhme and Section 1823(e) to appropriate circumstances.

D'Oench, Duhme protects the FDIC and Bank One only against the enforcement of secret side agreements which enable the maker of a note to take advantage of an undisclosed and fraudulent arrangement on the idea that the maker has "lent himself" to a scheme which tends to deceive

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[26] U.S. Const. amend. V; U.S. Const. amend. VII; see also Lytle v. Household Mfg., Inc., 110 S. Ct. 1331, 1335-36 (1990) (emphasizing a litigant's right to a trial by jury).

banking authorities.[27] Likewise, Section 1823(e) precludes enforcement of an agreement unless it is (i) in writing, (ii) executed by the bank contemporaneously with the bank's acquisition of the asset, (iii) approved by the board of directors of the bank, and (iv) contained in the official bank records from the time of its execution.[28] The present case is a classic example of how the

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[27] D'Oench, Duhme, 315 U.S. at 461.

[28] 12 U.S.C.A. § 1823(e). Section 1821(n)(4)(I) essentially reads the same except that it expressly applies to bridge banks. Because of the virtual identical nature of the two statutes, they will be collectively referred to as "Section 1823(e)" herein.

D'Oench, Duhme doctrine and Section 1823(e) have been extended far beyond the realm that was originally contemplated by the judiciary or the legislature. Here, the Court of Appeals has transformed an express, direct instruction from a banking officer to a borrower into an "agreement" whose enforcement is allegedly barred by the public policy enunciated in D'Oench, Duhme and Section 1823(e).

Graff states in his affidavit that he had ongoing discussions with MBank personnel regarding his debt obligation to MBank.[29] Graff further swears that although he attempted to continue paying interest on the note in question, MBank

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[29] Affidavit of Stanley V. Graff, ¶ 2, p. 2. Record on Appeal, V. 1: 121.

loan officers expressly instructed him to cease paying interest on the note.[30] It is this directive by MBank representatives upon which Graff bases his affirmative defenses of waiver and estoppel. It is also this directive by MBank representatives that the Court of Appeals determined was an "agreement" whose enforcement is precluded both by D'Oench, Duhme and by Section 1823(e). This ruling exceeds the accepted and usual course of judicial proceedings by going beyond what all other courts have determined to be an "agreement" subject to D'Oench, Duhme and Section 1823(e).

Here, the basic policy considerations of D'Oench, Duhme and Section

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[30] Affidavit of Stanley V. Graff, ¶ 2, p. 2. Record on Appeal, V. 1: 122.

1823(e) do not apply because there is no arrangement or agreement which understated the value of the insolvent bank's assets and thereby deceived banking authorities.[31] First, because the loan officers did not specify the length of time such forbearance was to continue, the Court of Appeals' conclusion that ". . . a note without interest is less valuable than a note with interest" is without support. The bank's directive did not obliterate the interest obligation contained within the express terms of the note. Rather, the note necessar-

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[31] See D'Oench, Duhme, 315 U.S. at 461 (holding that the doctrine precludes enforcement of secret side agreements involving schemes which tend to deceive banking authorities).

ily continues to contain an obligation to pay interest and MBank's directive simply specified non-payment of interest for an unstated period of time.

More importantly, there is no "agreement" involved here which invokes the protections of D'Oench, Duhme or Section 1823(e). Through judicial alchemy, the Court of Appeals improperly converts the unilateral, temporary instruction from a loan officer to Graff into an "agreement".[32] Once the Court of

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[32] Moreover, a major gap in proof by the FDIC-Receiver and Bank One occurs because both of those institutions fail to address this important issue in their affidavits despite the fact that Graff swears in his affidavit that MBank personnel "instructed" him not to pay

Appeals transformed the instruction into an "agreement", the Court used D'Oench, Duhme to obscure and eventually obliterate the existence of a bona fide fact issue. While no one questions a court's right to lawfully invoke the doctrine, a court cannot be allowed the unfettered discretion to invoke the doctrine in any and all circumstances, regardless of whether the requisite elements for application of the doctrine have been satisfied.

Even previous extensions of D'Oench, Duhme and Section 1823(e) do not support enlarging the application of the doctrine or statute to the present case. In fact, despite the extensions recognized in a

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interest on the note.

number of cases to date,[33] the ruling in

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[33] See e.g., FSLIC v. Griffin, 935 F.2d 691, 697 (5th Cir. 1991), cert. denied, 112 S. Ct. 1163 (1992) (court held that Griffin's defense based on a breach of agreement to fund was precluded by D'Oench, Duhme and § 1823(e)); Union Federal Bank of Indianapolis v. Minyard, 919 F.2d 335, 336 (5th Cir. 1990) (wherein the court held that D'Oench, Duhme precluded venturers' claim of usury that was not reflected in lender's records); Bowen v. FDIC, 915 F.2d 1013, 1015-17 (5th Cir. 1990) (wherein court held that claims that bank breached oral promise to extend loan were precluded by D'Oench, Duhme rule); Bell & Murphy and Assoc., Inc. v. Interfirst Bank Gateway, N.A., 894 F.2d 750, 753 (5th Cir.), cert.

this case far exceeds all prior extensions of both the doctrine and Section 1823(e). Neither the FDIC-Receiver nor Bank One have cited even one case in which the protections afforded by D'Oench, Duhme and Section 1823(e) have been extended to the express, unilateral instruction of a bank. Here, the lower court has proceeded beyond prior case law and has extended the protections too far, thereby depriving Graff of fundamental rights. The existence and effect of the bank's directive are not "matters of law"

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denied, 111 S. Ct. 244 (1990) (wherein court held that agreement whereby customer was to surrender accounts receivable and certain funds and bank was to extend loan and honor overdrafts was unenforceable under D'Oench, Duhme).

and should not be decided in a summary judgment proceeding. The Court of Appeals cannot be allowed to create, and then legitimize, a fictitious agreement which destroys a litigant's right to have a jury decide the relevant fact issues. This Court needs to inform the lower courts that the protections afforded to the FDIC-Receiver or its successor entities have limits. Moreover, this Court needs to emphatically enforce those limits when a lower court proceeds too far.

Additionally, the principles of Section 1823(e) are not available to protect Bank One.[34] The Court of Appeals

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[34] Bank One is essentially the "bridge bank" in this case because the change from Deposit Insurance Bridge Bank

repeatedly cites 12 U.S.C.A. § 1821[35] even though the statutory provision was not yet enacted and thus the protection was not yet available to a "bridge bank" at the time of the allegedly wrongful conduct by MBank.[36] Significantly, the statute does not contain any provision for retroactive application.

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was merely a change of name.

[35] Section 1821(n)(4)(I) expressly extended the protection of Section 1823(e) to "bridge banks."

[36] Pub. L. 101-73, which added subsection (n) to Section 1821, was enacted on August 9, 1989.

QUESTION 2 --- DEPARTURE FROM ACCEPTED AND USUAL COURSE; DUE PROCESS

Did the District Court recognize and then improperly obliterate the fact issue created by MBank's efforts to wrongfully pressure Graff's father and did the Court of Appeals thereafter err in denying the existence of the very same fact issue recognized by the District Court?

Graff asserted as an affirmative defense and by way of counterclaim that MBank wrongfully attempted to collect on the note in question through contacts with his father.[37] The trial judge clearly identified a fact issue with

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[37] See First Amended Original Answer, Original Counterclaim and Third-Party Petition, included in the Appendix as Exhibit "F".

respect to the wrongful collection practices of MBank by stating that:

> While a genuine, disputed issue of fact is presented in this case regarding whether MBank personnel engaged in unfair debt collection practices, the Court concludes, in light of the case law discussed above, that this fact issue is immaterial under the applicable law. Even if proven, Graff's claim of unfair debt collection practices by the plaintiffs is barred as a defense to his liability on the note by D'Oench, Duhme and its progeny.[38]

The fact issue arose from the pressure that MBank personnel wrongfully placed on Graff's father. Graff states in his affidavit that he saw MBank

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[38] Memorandum Opinion and Order Granting Summary Judgment, p. 7 (emphasis added), included in the Appendix as Exhibit "G".

personnel in a meeting with his father at his father's office and such personnel threatened Graff's father with legal action and attempted to pressure Graff's father into paying off the debt.[39] Graff further testifies that when he subsequently confronted MBank personnel with this conduct, MBank admitted that, without Graff's knowledge, they were attempting to have Graff's father pay off the debt in question.[40] Such a statement is clearly an admission against interest.[41] Graff's father is neither a

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[39] Affidavit of Stanley V. Graff, ¶ 4, pp. 3-4. Record on Appeal, V. 1: 123-24.

[40] Id.

[41] See Fed. R. Civ. Evid. 801(d)(2).

primary obligor of the debt nor a guarantor.[42] Consequently, the trial judge recognized the existence of a fact issue with respect to that conduct, but then held that any cause of action based on that conduct was precluded "by D'Oench, Duhme and its progeny." Upon its review, the Fifth Circuit did not follow the District Court's ruling but instead ruled that Graff's claim for unfair debt collection practices could not survive summary judgment based on the factual evidence before the Court.

First and foremost, D'Oench, Duhme and Section 1823(e) are once again inapplicable for the same reasons set

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[42] Id.

forth above.[43] Graff's claims for wrongful collection practices arise from the affirmative, unilateral, tortious conduct of MBank which occurred after the execution of the note in question and without any participation, acquiescence, involvement, or prior knowledge on the part of Graff. Rather, the tortious collection efforts by MBank occurred separate and apart from Graff's obligations under the terms of the note in question. Accordingly, there is simply no "secret side agreement" involved whose enforcement is precluded

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[43] Graff hereby incorporates his argument and authority relating to D'Oench, Duhme and 12 U.S.C.A. §§ 1821(n)(4)(I) and 1823(e) as set forth in Question 1 herein.

by either D'Oench, Duhme or Section 1823(e). The trial court's ruling based on an erroneous application of D'Oench, Duhme and Section 1823(e) departs from the accepted and usual course of judicial proceeding and deprives Graff of his fundamental rights to due process and a trial by jury.

Moreover, the Fifth Circuit based its holding on the fact that MBank was not attempting to collect the debt of "another" at the time of the wrongful practices, and thus was not a "debt collector" subject to the provisions of the Fair Debt Collection Practices Act.[44] This finding is necessarily premised on proof that MBank was the "owner" of the note in question at the time that it

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[44] 15 U.S.C.A. § 1692 et seq.

attempted to collect the amount due from Graff's father. The affidavits submitted by the FDIC and Bank One cannot and do not provide such proof. The summary judgment proof submitted to the District Court wholly fails to establish at what point in time, if at all, the promissory note executed to MBank Grand Prairie became the property of MBank Dallas, N.A.[45] Once again, the lower courts' ruling, based on substantively deficient affidavits, directly resulted in the summary judgment against Graff and thereby violates Graff's constitutional

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[45] See infra notes 58-59 and corresponding text for discussion and case authority as to the requirements for proving ownership of a promissory note.

rights to due process through a trial by jury.[46]

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[46] U.S. Const. amend. V; U.S. Const. amend. VII; see also Lytle v. Household Mfg., Inc., 110 S. Ct. 1331, 1335-36 (1990) (emphasizing a litigant's right to a trial by jury).

QUESTION 3 --- CONFLICT WITH ANOTHER FEDERAL COURT OF APPEALS; DEPARTURE FROM ACCEPTED AND USUAL COURSE; DUE PROCESS

Did the Court of Appeals improperly rely on tainted affidavits to eliminate fact issues and thus pave the way for the case to be decided by summary judgment rather than by trial?

In their rulings, both the District Court and the Court of Appeals necessarily rely on the affidavits of David Eisenstark[47] and Ron Tomlin.[48] However, the opinion of the Court of Appeals fails to address Graff's contention that the FDIC's and Bank One's affidavits are deficient and fails to address the

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[47] Record on Appeal, V. 1: 188-189.

[48] Record on Appeal, V. 1: 190-192.

District Court's adjudication of that issue. The failure to address the issue occurred despite Graff's specific assignment of error to the use of, and reliance on, the substantively deficient affidavits. This silence is a clear departure from the usual and accepted course of judicial review. The issue, once raised, required the Court of Appeals to address it. By failing to do so, the Court of Appeals deprived Graff of his due process rights.[49]

Moreover, a close examination discloses that both of these affidavits contain statements of "personal knowledge" which are insufficient, as a matter of law and logic, to support the conclusions claimed. The conclusions

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[49] U.S. Const. amend. V.

espoused by the affiants simply cannot be supported by the contents of the affidavits. Moreover, the lower courts' cavalier treatment of the deficient affidavits results in the summary judgment rulings against Graff and deprives him of his right to a trial by jury.[50]

In his affidavit, Mr. Eisenstark expressly states that the "facts stated herein are based on my personal knowledge which I acquired as described herein."[51] Mr. Eisenstark then goes on to state that "the FDIC had no reason to, and its representatives did not, contact any of Graff's relatives and/or others not liable as debtors or guarantors on Graff's debt seeking the payment or

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[50] U.S. Const. amend. VII.

[51] Record on Appeal, V. 1: 188.

recovery of Graff's obligations to Bank One . . . ."[52] However, Mr. Eisenstark provides no basis for reaching such a conclusion. Tellingly, Mr. Eisenstark did not swear that he asked each representative of the FDIC-Receiver whether or that representative had contacted any of Graff's relatives. Moreover, Mr. Eisenstark did not swear in his affidavit that he had questioned any of the MBank representatives, such as Bob Bell or Doug Sweeney who were unquestionably involved in Graff's lending relationship with MBank.[53]

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[52] Record on Appeal, V. 1: 189.

[53] See Affidavit of Stanley V. Graff, ¶ 2, p. 2. Record on Appeal, V. 1: 122.

Likewise, Mr. Tomlin also states in his affidavit that "[t]he facts stated herein are based on my personal knowledge which I acquired as stated herein."[54] He then testifies that "[f]rom March 28, 1989 to January, 1990, no BANK ONE agents or representatives contacted any of GRAFF's relatives and/or others not liable as debtors or guarantors on GRAFF's debt regarding the payment or recovery of GRAFF's obligations under the note."[55] Again, Mr. Tomlin cites no basis for reaching this conclusion. Once again, Tomlin did not swear that (i) he asked each and every Bank One representative to swear that they had not contacted any of Graff's relatives and/or others

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[54] Record on Appeal, V. 1: 190.

[55] Record on Appeal, V. 1: 191.

regarding Graff's debt, nor did he (ii) swear that he had asked each MBank agent or representative, including Mr. Bell or Mr. Sweeney, to swear that they had not contacted any of Graff's relatives and/or others about Graff's debt.

Most importantly, regardless of how the lower court ruled on the competency of Eisenstark's and Tomlin's affidavits, neither the FDIC nor Bank One ever located a person who was willing to swear that MBank personnel,[56] particularly Mr. Bell and Mr. Sweeney, had not contacted Mr. Graff's father with respect to

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[56] While Mr. Eisenstark swears to the conduct of the FDIC and Mr. Tomlin swears to the conduct of Bank One, no affiant swears to the conduct or involvement of MBank.

Graff's debt obligation. The failure to obtain such affidavit testimony casts doubt on the value of Eisenstark's and Tomlin's testimony since Graff himself swears that he saw MBank personnel in his father's office. Until such testimony is proffered to the court, the court cannot determine whether or not the conversations between the individuals and Graff's father were "trivial and isolated", insulting, threatening, or offensive. Moreover, all reasonable inferences of fact must be construed in favor of Graff, the party opposing the summary judgment.[57] Thus, even if the summary judgment evidence does not implicate FDIC representatives or Bank One representa-

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[57] Walker v. Sears, Roebuck Co., 853 F.2d 355, 358 (5th Cir. 1988).

tives, the gaps in the affidavits submitted by the FDIC and Bank One unquestionably highlight the significant fact issue relating to the potentially wrongful conduct of MBank personnel.

Additionally, the affidavits filed by the FDIC and Bank One fail to establish a valid transfer of the note in question from its original payee, MBank Grand Prairie, to the successor entities or assignees, and ultimately to Bank One, Texas, N.A. In particular, none of the affidavits support the allegations as to ownership of the note with any documentation whatsoever.[58] In fact, no affiant

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[58] See FDIC as Receiver of Lakeland State Bank Austin, Texas in its Receiver and Corporate Capacities v. Clark, No. 91-8259 (5th Cir. 3/16/92),

ever attempts to prove up the chain of title from MBank Grand Prairie to MBank Dallas, N.A. with competent summary judgment evidence. Because the FDIC and Bank One fail to even attach a copy of the note in question to any affidavit, it is impossible to determine whether or not the note has been endorsed to the FDIC or any other successor entity. Without proof of such endorsement, FDIC, or Bank One, must prove the transaction through which the note was acquired in order to

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958 F.2d 1079 (5th Cir. 1992) (holding that even possession of the original of an unendorsed note payable to the order of another is not alone sufficient or prima facie evidence of ownership or being a holder).

establish ownership,[59] a requirement which both the FDIC and Bank One have failed to satisfy. Moreover, the summary judgment evidence fails to prove that the succession of entities following MBank Dallas, N.A.'s declaration of insolvency have a right to possession or ownership of the note, particularly in light of MBank Dallas, N.A.'s widely known claims that the declaration of insolvency was improper and subject to annulment.

While the Court of Appeals does not even address Graff's contention that the affidavits of Bank One and FDIC-Receiver are legally and substantively deficient,

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[59] See Jernigan v. Bank One, Texas, N.A., 803 S.W.2d 774, 777 (Tex. App. - Houston [14th Dist.] 1991, no writ).

the District Court held that the affidavits were competent evidence within the meaning of Laborers' International Union v. United States Department of Justice.[60] However, that holding is in conflict with numerous other decisions on the same matter. Contrary to the District Court's use of the case, Laborers' International applies to a very limited set of circumstances. It merely holds that an affidavit based upon the affiant's review of a report and his general familiarity with Department of Justice investigations was competent evidence notwithstanding the fact that the affiant did not declare that he took

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[60] 578 F. Supp. 52, 56 (D.C. D.C. 1983), aff'd without opinion, 748 F.2d 714 (D.C. Cir. 1984).

part in the creation of the report in question or that he spoke to those who created the report.[61]

Laborers' International is simply not applicable to the present situation. The affiants, David Eisenstark and Ron Tomlin, make conclusions and assertions with respect to the conduct of all representatives of Bank One and the FDIC, respectively, without supporting those assertions with the basis for that knowledge. Neither Mr. Eisenstark nor Mr. Tomlin state what steps they took to reach their conclusions nor state the basis for their "personal knowledge." Federal courts of appeals repeatedly and consistently require that an affidavit be

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[61] Id. at 53-54.

based on the personal knowledge of a competent affiant.[62]

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[62] See e.g., Sellers v. M.C. Floor Crafters, Inc., 842 F.2d 639, 643 (2d Cir. 1988) (holding that hearsay affidavit is not a substitute for affidavit based on personal knowledge of party and thus will not support motion for summary judgment); Buchanan v. Stanships, Inc., 744 F.2d 1070, 1073 (5th Cir. 1984) (in ruling on summary judgment motion, district court may consider only those allegations that would be admissible in evidence and are made on personal knowledge of affiant); Toro Co. v. Krouse, Kern & Co, Inc., 644 F. Supp. 986, 990 (N.D. Ind. 1986), aff'd, 827 F.2d 155 (7th Cir. 1987) (holding that fact that introductory paragraphs in

The lower courts' failure to critically examine the affidavits submitted in support of the summary judgment ultimately deprived Graff of his fundamental rights to due process and a trial by jury. Because the granting of a summary judgment is such a harsh result, Bank One and the FDIC must be held to the appropriate evidentiary standards. Despite the far-reaching judicial legislation and the over-extension of doctrines such as D'Oench, Duhme, no court has ever held nor has it been legislated that the FDIC and its successor entities are entitled

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affidavits offered in support of summary judgment recite that they are made on personal knowledge will not cure deficiencies in affidavits with respect to showing of personal knowledge).

to a "trial by summary judgment." The FDIC and Bank One are only entitled to a summary judgment once they have met the burdens placed on them by the Federal Rules of Civil Procedure, prevailing case law, and relevant legislation. A summary judgment without the requisite evidentiary proof, as here, deprives Graff of his due process rights and his right to a trial by jury.

CONCLUSION

The incredible extension of D'Oench, Duhme and Section 1823(e) to the present case reaches far beyond logic, reason, or prior case law. This Court must set limits for application of the protections and enforce those limits where necessary to protect the fundamental, constitutional rights of individuals.

Moreover, once a fact issue is created with respect to a particular cause of action, a court cannot decide that issue by summary judgment but must proceed to a trial by jury. It is clear that the summary judgment evidence before the lower courts creates a fact issue as to the wrongful debt collection efforts of MBank. Graff is entitled to prove his cause of action relating to that wrongful

conduct in the setting of a jury trial. His claim in this case is not barred by D'Oench, Duhme or Section 1823(e) just as it cannot be barred through the use of substantively deficient affidavits which are not based on the personal knowledge of the affiants.

WHEREFORE, Petitioner Graff prays that his petition be granted.

Respectfully submitted,

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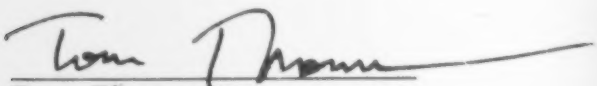
By: 
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